

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

### **FACTUAL HISTORY**

On January 7, 2010 appellant, then a 44-year-old distribution/window clerk working restricted duty, filed a claim alleging that from December 14 through 17, 2009 she experienced increasing pain in her neck, upper back and arms.<sup>2</sup> She noted that she had returned to the employing establishment after being on a detail for approximately six months and asserted that the employing establishment had no heat and this, plus duties of casing mail, lifting and throwing parcels and other duties caused her condition. Appellant submitted treatment notes from Dr. H.S. Pabla, a Board-certified orthopedic surgeon, dated from December 21, 2009 to January 11, 2010, in which he noted appellant's complaint of neck pain. Dr. Pabla provided physical examination findings. He diagnosed a cervical strain and advised that appellant was unable to work from December 18, 2009 to January 3, 2010. In reports dated February 1 and March 1, 2010, Dr. Pabla reported that electromyography and nerve conduction studies were abnormal and consistent with cervical radiculopathy.

Appellant filed CA-7 claims for compensation for the period December 18, 2009 to February 12, 2010. In a March 20, 2010 statement, she reported that she had experienced radiating neck pain since an October 9, 2003 injury.

By decision dated April 13, 2010, the Office denied appellant's claims for compensation for the period December 18, 2009 to February 12, 2010.

In an April 22, 2010 decision, it denied that she sustained an injury in the performance of duty causally related to factors of her federal employment. In correspondence postmarked May 17, 2010, appellant requested a hearing of the April 13, 2010 decision. On May 18, 2010 she requested a hearing of an "April 26, 2010" decision.

In a decision dated June 11, 2010, the Office denied appellant's request for a hearing regarding the April 13, 2010 decision as untimely. A hearing was held on August 26, 2010 regarding the April 22, 2010 decision. At the hearing appellant testified about her neck condition. She stated that she had been receiving wage-loss compensation since March 5, 2010 for an employment-related knee condition, and was only seeking wage-loss compensation from December 2009 to March 2010, noting that her medical bills were being paid. By decision dated November 19, 2010, an Office hearing representative set aside the April 22, 2010 decision. She found the medical evidence was sufficient to warrant further development on the issue of whether appellant sustained the claimed injury, and remanded the case for a second opinion evaluation, to be followed by a *de novo* decision.

### **LEGAL PRECEDENT -- ISSUE 1**

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if

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<sup>2</sup> Appellant filed a recurrence claim for an October 2003 injury adjudicated by the Office under file number xxxxxx416. The Office adjudicated the instant claim as a new injury. See discussion *infra*.

it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.<sup>3</sup> The Board has held that the Office, in its broad discretionary authority in the administration of the Act has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>4</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

In its June 11, 2010 decision, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. It found that she was not, as a matter of right, entitled to a hearing as her request, postmarked May 17, 2010, had not been made within 30 days of its April 13, 2010 decision. As appellant's request was postmarked May 17, 2010, more than 30 days after the date of the April 13, 2010 decision, the Board finds that the Office properly determined that she was not entitled to a hearing as a matter of right as her request was untimely filed.<sup>6</sup>

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the June 11, 2010 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>7</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion. The Office therefore properly denied her request.

Pursuant to section 501.2(c) of its procedures, the Board has jurisdiction to consider and decide appeals from a final decision issued by the Office.<sup>8</sup> The procedures also provide that "there shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case."<sup>9</sup> The Board notes that the hearing representative's

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<sup>3</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>4</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>5</sup> *Claudio Vazquez*, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> *See Mary Poller*, 55 ECAB 483 (2004).

<sup>8</sup> 20 C.F.R. § 501.2(c).

<sup>9</sup> *Id.* at § 501.2(c)(2).

November 19, 2010 decision, directed that the case be remanded for further development of the medical evidence, to be followed by a *de novo* decision. In view of the development directed by the hearing representative, to consider appellant's appeal at this stage would involve a piecemeal adjudication of the issues in this case and raise the possibility of inconsistent results which is contrary to the Board's policy.<sup>10</sup> As the Office has not issued a final decision pursuant to the hearing representative's decision, the matter remains in an interlocutory posture.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a hearing.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 20, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> *William T. McCracken*, 33 ECAB 1197 (1982).